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CURRENT TOPICS.

The case of Auerbach v. New York, etc. R. Co., is an important authority upon the effect to be given to the regulations of carriers limiting the time within which passengers' tickets must be used, and so far as we have been able to discover, is the first instance upon the principles involved. The plaintiff, Auerbach, in September, 1877, purchased a coupon ticket from St. Louis to New York, the last coupon of which was good from Buffalo to New York. It was specified upon the ticket that the purchaser agreed to use it on or before Sept. 26, 1877, and that if he failed to do so, the carrier might refuse to accept it. Wishing to stop at Rochester, Mr. Auerbach purchased a ticket of the Central Railroad from Buffalo to Rochester. On the afternoon of September 26 he got on a train at Rochester to complete his trip to New York. He then presented his original ticket, with the one coupon attached, to the conductor, and it was accepted by him, and was recognized as a proper ticket and punched several times until the plaintiff reached Hudson, about 3 or 4 o'clock on the morning of September 27, when the conductor declined to recognize the ticket on the ground that the time had run out, and demanded $3 fare to New York. Mr. Auerbach declined to pay, and the conductor ejected him with force from the car. The trial judge nonsuited Mr. Auerbach on the ground that the ticket entitled him to a continuous passage from Buffalo to New York, and not from any intermediate point to New York. The General Term affirmed the nonsuit on the ground that although the plaintiff began his passage upon September 26, he could not continue it after that date on that ticket. The Court of Appeals holds that upon neither ground should he have been nonsuited. "The plaintiff," says Judge Earl in his opinion, "was bound to a continuous passage over the defendant's road; that is, the plaintiff could not enter one train of the defendant's cars and then leave it and subsequently take another car and complete his journey. He was not, however, bound to commence his passage at Buffalo. He could commence it at Rochester, or Albany, or any other point between Buffalo and New York, and then make it continuous. * * * * When the plaintiff entered the train at Rochester on the afternoon of the 26th of September and presented his ticket and it was accepted and punched, it was then used within the meaning of the contract. It could then have been taken up. So far as the plaintiff was concerned, it had then performed its office. It was thereafter left with him, not for his convenience, but under regulations of the defendant for its convenience, that it might know that his passage had been paid for. The contract did not specify that the passage should be completed on or before the 26th inst., but that the ticket should be used on or before that day, and that it was so used it seems to us is too clear for dispute." A new trial was granted.

In connection with our remarks upon the cases of Goddard v. O'Brien and Mechanics' Bank v. Huston (14 Cent. L. J. 401; in which it was held that the general rule, that the acceptance by the creditor of a sum less than the amount of his claim, will not constitute an accord and satisfaction, does not apply to the case where the amount so accepted is in the form of a negotiable instrument), the quaint judicial utterance of Jessel, M. R., in the recent case of Couldery v. Bartram (L. J. 19 Ch. D. 399), will be found of interest. He says: "According to English common law, a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tomtit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English common law, he could not take 19*s.* 6*d.* in the pound; that was *nudum pactum*. Therefore, although the creditor might take a canary, yet, if the debtor did not give him a canary, together with his 19*s.* 6*d.*, there was no accord and satisfaction; if he did, there was accord and satisfaction. That was one of the mysteries of English common law. * * * * Well, it was felt to be a very absurd thing that the creditors could not bind themselves to take

less than the amount of their debts. Therefore it was necessary to bind the creditors; and, as every debtor had not a stock of canary birds, or tomtits, or rubbish of that kind to add to his dividend, it was felt desirable to bind the creditors in a sensible way by saying that, if they all agreed, there should be a consideration imported from the agreement constituting an addition to the dividend so as to make the agreement no longer *nudum pactum*, but an agreement for valuable consideration; then there would be satisfaction."

COLLATERAL SECURITIES.

I.—Collateral security may be defined as an additional security, running along with and collateral to an original indebtedness. It need not be in the precise form of the original; thus a bond may be secured by a collateral security in the form of a bill or note, and *vice versa*. Where a bill or note is negotiated as collateral security, the title passes the same as if the money was advanced. The term imports a prior debt, and that the new security thus given for its payment, depends entirely upon it, and will stand or fall with it as far as the creditor is concerned. The delivery or indorsement of a bill or note by a debtor to a creditor, may be either as a means of satisfaction and payment of the antecedent debt, or it may be merely for the purpose of placing greater or cumulative security in the hands of the party for the payment of his debt. It is very important to ascertain the exact intention of the parties at the time of such indorsement. [1]

II.—If the creditor accepts the note as payment and satisfaction of the pre-existing debt, he looses his right against any surety and indorser, who have the right to require that no change be made; but if he accepts the indorsement as collateral security, the debt will remain in full force against all who were originally liable for its payment. Satisfaction must arise from the agreement of the parties, and not from the thing given in payment. Hence it must be specifically proven and can not be implied.[2] The delivery or indorsement of a bill or note by a debtor to his creditor, on account of a pre-existing debt, falls directly within this principle, and wil be regarded as an additional security or means of satisfaction, unless there is express proof that it was meant to have a more extended operation. In Clark v. Miendal [3] the court said, "that a bill should never go in discharge of a precedent debt, except it be part of the contract that it should be so." The view as thus stated has never been disputed in England, and has been followed in most of the States in this country. We may, therefore, consider it as the general rule that taking a negotiable instrument, made by a debtor or by a third party, on account of a pre-existing debt, does not imply a discharge or extinguishment of the debt for which it is taken, nor confine the creditor to proceeding on the new cause of action, unless such was the agreement or understanding of the parties. [4]

III.—A *bona fide* holder of a negotiable instrument transferred to him before maturity in the usual course of business, is a holder for value and will not be affected by any equities existing between the original parties to the instrument.[5] The same rule ap-

[1] Le Breton v. Pierce, 1 Am. Law Reg. 35, note by Judge Redfield.

[2] 1 Am. Lead. Cases, 242; 1 Smith's Lead. Cases, 445; Downey v. Hicks, 14 How. 240; Lyman v. United States Bank, 12 How. 225; Gregory v. Thomas, 2 Wend. 47; Phillips v. Johnson, 8 Johns. 58; Gallagher's Ex'rs v. Roberts, 2 W. C. C. 191; Woodward v. Miles, 4 Foster, 289; Hart v. Bailey. 16 S. & R. 162; Wakely v. Bell. 9 Watt. 280.

[3] 1 Salk. 124.

[4] Johnson v. Weed, 9 John. 360; Schemerhorn v. Lornes, 7 Johns. 311; Herrings v. Songer, 3 Johns. 71; Olcott v. Raithbone, 5 Wend. 490; Hay v. Stone, 7 Hill, 129; Jossfrey v. Cornish, 10 N. H. 510; Elliott v. Sleeper, 2 N. H. 327; Maze v. Miller, 1 W. C. C. 328; Gallagher's Ex'rs v. Roberts, 2 W. C. C. 328; Harris v. Lindsey, 4 W. C. C. 271; Peters v. Beverly, 10 Pet. 532; Elwood v. Deffendorf, 5 Barb. 398; Vann Epps v. Dillage, 6 Barb. 244; Vale v. Foster, 4 Conn. 312; Glen v. Smith, 2 Gill. & J. 492; Bill v. Porter, 9 Conn. 23; Perit v. Pitfield, 5 Rawle. 166; Tynn v. Pollock, 1 Pa. 375; McGuinn v. Holmes, 2 Watt. 221; Rinsley v. Buchannan, 5 Watt. 118; McLaughan v. Bovard, 4 Watt. 308; Cassello v. Cave, 2 Hill's C. C. 528; Chustum v. Johnson, 2 Baily, 574; Prescott v. Hubbell, 1 McCord, 94; Speare v. Atkinson, 1 Ired. 262; Watson v. Owens, 1 Rich. 111· Gordon v. Price, 10 Rich. 385; Weed v. Snow, 3 McLean, 265: Gardner v. Gorham, 1 Doug. 507; Schorlotte v. Hammond, 9 Mo. 59; Ayer v. Van Lien, 2 Southord, 765; Kelsey v. Roxborough, 2 Rich. 226; Clark v. Savage, 20 Conn. 258; James v. Hackley, 16 Johns. 273; Peters v. Beverly, 16 Pet. 532, 568; Muldron v. Whitelock, 1 Cow. 290; Henbach v. Mallman, 12 Duer. 227.

[5] Dovey's Appeal, 97 Pa. St. 163; Burnes v. Row-

plies where the indorsement is made as collateral security for a pre-existing debt, if at the time of the indorsement some consideration was given; such as a further advancement, a stipulation, express or implied, or further time for the payment of the debt.[6] If no new consideration is given at the time of the transfer, so that it is a mere voluntary act on the part of the debtor, and is received by the creditor without incurring any new responsibility, parting with any right, or subjecting himself to any loss or delay, thus leaving the existing debt in precisely the same condition as it was before, it will still be subject to all pre-existing equities.[7] Much discussion has grown out of the question whether, from the very nature of such a contract, there is not a sufficient consideration to make the indorsee a holder for value. In England it appears to be well settled that no other consideration is essential;[8] and the same has been held by the courts of Vermont, Massachusetts and New Jersey. This was also the opinion of Judge Story, as expressed in the celebrated case of Swift v. Tyson. A contrary doctrine is held in Tennessee, and New York, and in many States the decisions are conflicting.[9]

IV.—There is always a presumption that the holder received the instrument in good faith. He does not owe to the party who puts such paper in circulation the duty of active inquiry to avert the imputation of bad faith. The rights of the parties are to be determined by the simple tests of honesty and good faith, and not by any mere speculations as to his probable diligence or negligence.[10]

land, 4 Barb. 367; Paddon v. Taylor, 44 N. Y. 371; Brush v. Scribner, 17 Conn. 388; Homes v. Smith, 10 Me. 177; Hascall v. Whitmore, 19 Me. 102; Dudley v. Littlefield, 21 Me. 418; Norton v. Waite, 20 Me. 170; Bertram v. Beekman, 8 Ark. 150; Varnum v. Bellamy, 4 McLean, 87; Walker v. Geisse, 4 Wheat. 252; Russell v. Haddock, 3 Gilman, 233; Bartwick v. Dodge, 1 Doug. 413; Reddick v. Jones, 6 Ired. 307; Breckenbridge v. Moore, 3 B. Mon. 629; Pond v. Lockwood, 8 Ala. 669; Barney v. Earl, 13 B. Mon. 106; Bush v. Packard, 3 Harrington, 385; Bond v. Park. 2 Ga. 92; Curtis v. Leavitt, 31 N. Y. 113; Young v. Lee, 18 Barb. 187; Carlisle v. Wishart, 10 Ohio, 172; Norton v. Waite, 20 Me. 175; Dixon v. Dixon, 21 Vt. 450; Emanuel v. White, 34 Miss. 56; Stevens v. Campbell, 31 Wis. 215; Struthers v. Kendall, 5 Wright, 214; Kellogg v. Fancher, 23 Wis. 31; Holmes v. Smyth, 16 Me. 177; May v. Quimby, 3 Bush, 96; McKnight v. Knisley, 25 Ind. 336; Bank of Republic v. Carrington, 5 R. I. 515; Vatterlien v. Howell, 4 Sneed. 441; King v. Doolitle, 1 Head. 77; Wormly v. Lowry, 1 Humph. 468; Swift v. Tyson, 16 Pet. 1; Bank of St. Albans v. Gilliland, 23 Wend. 31; Bank of Sandusky v. Scoville, 24 Wend. 115; Henry v. Ritenour, 31 Ind. 136; Robinson v. Lair, 31 Ia. 9; Schepp v. Carpenter, 51 N. Y. 602; Bank v. Babcock, 21 Wend. 500; Pratt v. Coman, 37 N. Y. 440.

[6] Bowman v. Van Kuren, 29 Wis. 219; Lyon v. Ewing, 17 Wis. 70; Curtis v. Mohr, 18 Wis. 619; Jenkins v. Schaub, 14 Wis. 1; Slotts v. Byers, 17 Ia. 303; Griswold v. Davis, 31 Vt. 390; Chicopee Bank v. Chapin, 8 Met. 40; Louisiana State Bank v. Gaennie, 21 La. An. 551; Munn v. McDonald, 10 Watt. 270; Williams v. Smith, 2 Hill, 301; Ferdon v. Jones, 2 E. D. Smith, 106; Bank of New York v. Vanderhost, 32 N. Y. 253; Watson v. Cabot Bank, 5 Sandf. 423; Trustees of Iowa College v. Hill, 12 Ia. 462; Roberts v. Hall, 10 Am. Law Reg. 760; Robinson v. Smith, 14 Cal. 94; Bridgeport City Bank v. Welch, 29 Conn. 475; Manning v. McClure' 36 Ill. 490; Stevenson v. Hayland, 11 Minn. 198; Boyd v. Cummins, 17 N. Y. 101; Cobb v. Doyle, 7 R. I. 550; Bond v. Wiltse, 12 Wis. 611; Atkinson v. Brooks, 26 Vt. 569; Brookman v. Metcalf, 32 N. Y. 591; Roxborough v. Meesick, 6 Ohio St. 448.

[7] Bramhall v. Bechell, 31 Me. 205; Bay v. Coddington, 5 John. Ch. 55; Coddington v. Bay, 20 Johns. 637; Kilpatrick v. Muirhead, 16 Pa. 117; Williams v. Little, 11 N. H. 66; Jenness v. Bean, 10 N. H. 266; Staker v. McDonald, 6 Hill, 93; Petrie v. Clark, 11 Sarg. & R. 377; Prentiss v. Zane, 2 Gratt. 262; Raddick v. Jones, 6 Ired. 109; Cullum v. Bank of Mobile, 4 Ala. 21; Andrews v. McKay, 8 Ala. 920; Kimbro v. Lytle, 10 Yerg. 417; Nichols v. Bate, 10 Yerg. 429; Brook v. Whitson, 7 Smed. & M. 513; Bertram v. Barkham, 13 Ark. 150; Goodman v. Simond, 19 Me. 106; Roxborough v. Mesick, 6 Ohio St. 448; 1 Am. Ld. Cas., 336; McConnell v. Hudson, 2 Glim. (Ill.) 648; Sargeant v. Seargant, 18 Vt. 371; Williams v. Little, 11 N. H. 66; Fletcher v. Chase, 16 N. H. 68; Wast v. American, etc. Banking Co., 44 Barb. 175; Manhattan Co. v. Reynolds, 2 Hill, 140; Trustees of Iowa College v. Hill, 12 Iowa, 462; Ryan v. Shew, 13 Iowa, 589; Rice v. Raitt. 17 N. H. 116.

[8] In Powers v. Morris, 20 Eng. L. & Eq. 103, Lord Campbell, C. J., said: "There is nothing to make a difference between this case and a common case where a bill is taken as security for a debt, and in that case an antecedent debt is a sufficient consideration." Campton, J., said: "Whether the bill was a collateral security, or whether it has the effect of suspending the payment of the antecedent debt, is quite immaterial." See 1 Daniel on Neg. Inst. 622.

[9] *Vide* Brown v. Leavitt, 31 N. Y. 113; Ayrault v. McQueen, 32 Barb. 305; Stoddard v. Kimball, 3 Cush. 469: Chicope Bank v. Chopin, 8 Metc. 40; Blanchard v. Stevens, 3 Cush. 161; Atkinson v. Brooks, 26 Vt. 569; Allaire v. Hartshorne, 1 Zab. 665; Prentiss v. Graves, 33 Barb. 621; Ontario Bank v. Worthington, 12 Wend. 593; Prentiss v. Zane, 2 Gratt. 262; Bertrand v. Barkman, 8 Eng. (Ark.) 150; Cullum v. Branch Bank, 4 Ala. 21; Roxborough v. Mesick, 6 Ohio St. 448; Cook v. Helms, 5 Wis. 187; Payne v. Bensley, 8 Cal. 260; Park v. Bank of Watson, 3 Hand. (42 N. Y.) 490, Palmer v. Richards, 1 Eng. L. & Eq. 529.

[10] Goodman v. Harvey, 4 Ad. & El. 870; Bank of Bengalos v. Fagin, 7 Moore, P. C. 61, 72; Rapael v. Bank of England; 33 Eng. L. & Eq. 276; Trustees of Iowa College v. Hill, 12 Iowa, 462; Ayer v. Hutchins, 4 Mass. 370; Cone v. Baldwin, 12 Pick. 546; Hall v. Hall, 8 Conn. 337; Beltzhoover v. Blackstock, 3 Watt. 20; Hunt v. Sanford, 6 Yerg. 387; Fowley v. Brantley, 14 Peters, 318; Brown v. Taber, 5 Wend. 565; McKerson v. Sternberg, 3 Ohio St. 156, Russell v. Had-

V.—A creditor may hold an unlimited number of collaterals, and avail himself of any or all of them so long as his debt remains unpaid. A recovery of a part of the debt will not prevent an action on the collateral covenants to recover the balance unpaid. The acceptance of such security implies no contract or agreement on the part of the acceptor to proceed upon it before proceeding against the surety. A holder of general securities may accept collateral or special security, and proceed upon either, or both, at his option. The right to determine which he will enforce is entirely with him, and not with the debtor or those claiming under him. Nor is it necessary that he first have recourse to the original debt. For all purposes of dominion his ownership over the collateral instruments is complete. If the collaterals mature before the original debt, he may collect the money and hold it in lieu of the original evidence of indebtedness.[11] The recovery of a judgment against the principle debtor on the original note, is no bar to an action against him and another on a note given as collateral security for the debt of the principal, so long as the judgment remains unsatisfied. Reducing a debt to a judgment will not discharge the surety. Such an act is merely an additional security. So a judgment by confession, which is intended as cumulative security, will not affect other securities.[12]

VI.—A failure, or refusal, on the part of a creditor to give an account of the application of property received as collateral security for a debt, will bar a recovery on the debt itself. If he refuse to give any account whatever of what disposition he has made of them, or where they are, the presumption is that he has converted them to his own use and advantage. So if, through his own negligence, they are lost or damaged, he will be presumed to have made them his own in satisfaction of his debt. If the collaterals have never been in his possession or under his control, but have been placed by the debtor in the hands of a third person, chosen by himself, the creditor may recover on the principal security, although the collaterals be not accounted for. Even though they were placed in the custody of the creditor, if he is guilty of no negligence, and realizes nothing from them, and gives freely all information in regard to them to the best of his knowledge when required to furnish it, he will be entitled to judgment on his debt. In a suit for the collection of the principal debt, the debtor must prove that the notes held as collateral security could have been collected, had the holder used due diligence in order to obtain credit for them. The giving of a mere note without objection or abatement, will amount to waiver of an alleged misapplication.[13]

VII.— The mere deposit of promissory notes with a creditor by a debtor, without indorsement as collateral security for a debt, will not divest the pledgor of his legal ownership, but will merely vest in the creditor, or pledgee, a contingent equitable interest in the notes, or the proceeds thereof, in case the debt should be paid, subject to any prior equities then existing in favor of the maker against the pledgor.[14]

dick, 3 Gill. (Ill.) 233; Kelley v. Ford, 4 Iowa, 140; State Bank v. New Orleans Navigation Co., 3 La. 2 Ann. 94; Lawson v. Weston, 4 Espinasse, 57, Opinion by Lord Kenyon; Barkhouse v. Harrison, 5 Barn. & Ad. 909.

[11] Jones v. Hawkins, 17 Ind. 550; Nelson v. Edwards, 4 Barb. 279; Dix v. Tally, 14 La. Ann. 456; Ager v. Watson, 57 Pa. St. 350; Anderson v. Sutton, 2 Bland. 629; Commissioners of Cambria County v. Canan, 2 Watt. 107; Cullum v. Emanuel, 1 Ala. 23; Buchanan v. International Bank, 79 Ill. 500; Lisk v. Obrean, 4 Watt. 144; Union Bank v. David, 2 Whart. 390; Rousse v. Elder, 15 Wend. 218; Gardner v. Maxwell, 27 La. Ann. 561; Hanna v. Holton, 70 Pa. St. 334; Heath v. Silverthorne, etc. Co., 39 Wis. 147.

[12] Charles v. Coker, 2 S. C. 122; Gardner v. Hust, 2 Rich. 601; Smith v. Strout, 63 Me. 205; Bank of Chenango v. Hyde, 4 Cow. 567; McCullough v. Hellman, 8 Ark. 191; White v. Smith, 33 Pa. St. 186; Fireman's Ins. Co. v. McMillen, 29 Ala. 147; Tice v. Annin, 2 John. Ch. 125; Dunkley v. Van Buren, 3 John. Ch. 330. Where the subject matter of the security is personal property, a partial delivery will be good between the parties, although not sufficient to give notice to other creditors. Tully v. Robertson, 78 Ill. 332.

[13] Girard Bank v. Richards, 4 Phila. 250; Reeves v. Plough, 41 Ind. 204; May v. Sharp, 49 Ala. 140; Dugan v. Sprague, 2 Ind. 600; Lyon v. Huntingdon Bank, 12 S. & R. 61; Bank of United States v. Peabody, 20 Pa. St. 454; Spauldings v. Bank of Susquehanna County, 9 Barr. 29; Limes v. Zaur, 1 Phila. (Pa.) 501, Greenwald v. Metcalf, 28 Iowa. 363; Collingswood v. Irwin, 3 Watt. 306; Beal v. Farmers', etc. Bank, 5 Watt. 529; Miller v. Gettysburg Bank, 8 Watt. 192. He is not under obligation to take any great trouble or risk in enforcing the collection. Ormsby v. Fortune, 16 Serg. & R. 302; Leas v. James, Ibid. 307; Lamberton v. Windom, 18 Minn. 50; Grigg v. Howe, 2 Abb. (N. Y.) App. 291; Bank of United States v. Peabody, 20 Pa. St. 454; Miller v. Gettysburg Bank, 8 Watt. 192; Lord v. Ocean Bank, 20 Pa. St. 384.

[14] Snow v. Fourth National Bank, 68 Conn. 420.

VIII.—The fact that a note was given as a mere accommodation on the part of the maker, and that no consideration was ever paid for it, is no defense against it in the hands of a third person who holds it as collateral security. He who chooses to put himself in the front of a negotiable instrument for the accommodation and benefit of a friend, must stand by the consequences. He has no right to complain if his friend accommodate himself by pledging it for an old debt. Accommodation paper is a loan of the makers credit without restriction as to the manner of its uses.[15]

IX.— Where bonds are pledged as collateral security, and the pledgor fails to redeem them, the pledgee may sell them, but he can not become the purchaser himself. Such bonds are practically, though not technically, negotiable instruments. They pass by delivery, and may be sued for by the holder in his own name. The burden of proof is, therefore, upon the party who alleges that they were not received in the usual course of business and for a valuable consideration. A person who holds them as collateral security has the right to receive the full amount and not merely the face of his claim with interest, unless subsequent creditors have a resulting interest in the debtor.[16] Impeaching the pledgors title to collaterals without setting up title in some other person under whom the defendant claims, is no defense to an action for the conversion of the securities. In Smith v. Hall, Rapallo, J., said: "The rights of the holder of the bond are founded upon his own title and not upon any promise of the defendants. The wrong done is the conversion of his property and not the mere breach of an agreement to deliver property to him."[17]

X.—The creditor's right to the possession of collateral securities terminates immediately upon a tender of the amount of the debt on the day of maturity, and it is an immediate conversion for him to refuse the tender and retain the security on a claim of title based upon an alleged forfeiture by reason of delay in making payment. But if the debtor is in default by reason of having delayed payment beyond the maturity of the debt, such a refusal will not be a conversion. In this case the position of the debtor is not one from which to be exacting as to the element of time. The tender must now be enlarged so as to cover all charges the creditor may have lawfully paid on the pledge prior to the tender. Especially will this be true where the delinquent debtor had knowledge of such costs, or could have acquired such knowledge by ordinary diligence, and yet failed to enlarge his tender accordingly.[18]

Sec. XI.—It is the duty of one who holds negotiable paper as collateral security to protect it for non-payment, and a failure to do so will amount to a conversion, and release the indorsers from any further liability. Evidence that the indorser suffered no injury from such a course, or that the maker was insolvent when the note was given, can not be introduced as a defense. The value of a note depends not alone upon the insolvency of the maker, but also upon his integrity and business habits. The consequences resulting from the laches of the creditor necessarily suppose an implied contract to do all acts, the omission to do which is followed by such consequences.[19]

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[15] Lord v. Ocean Bank, 20 Pa. St. 386. The fact that the creditor holds other security more than sufficient to cover his debt, is no ground of defense for such a maker. Lyon v. Huntington Bank, 12 S. & R. 61.

[16] Water Power Co. v. Brand, 23 Kan. 676; Histonville R. Co. v. Shields, 3 Brad. 257; Rice v. Southern Pennsylvania Iron and R. Co., 9 Phila. 294. "Negotiable notes, bills of exchange and bonds issued by government or by private corporations, in a negotiable form, are usually pledged as collateral security by a delivery of the instrument so indorsed, where that is necessary, as to vest the title in the pledgee, and the circumstance that the title is in form transferred to the pledgee, does not materially affect the contract of pledge. The pledgee takes the title in trust to sell the bonds, they being usually bought and sold like stocks, and to collect the negotiable note or bill when they become due, and apply the proceeds on the debt to secure which they are given." Edwards on Bailment, sec. 222; Potter v. Thompson, 10 R. I. 1.

[17] Smith v. Hall, 67 N. Y. 48, where the authorities are collected and reviewed. Seely v. Englee, 17 Barb. 530; Witherspon v. Van Dolar, 15 How. 266; Catlin v. Gunter, 1 Duer. 253; Raynor v. Finierson, 46 Barb. 526.

[18] McCalla v. Clark, 55 Ga. 53. If a creditor accepts collateral security from an administrator without knowledge of the insolvency of the estate, he can not be compelled to re-assign them and accept a dividend upon the estate proving insolvent. Kittera's Estate, 17 Pa. St. 416; Strong v. Adams, 30 Vt. 220.

[19] Whitten v. Wright, 34 Mich. 90; Jennis v. Palker, 7 Mich. 355; Clark v. Young, 1 Cranch. 181; Dayton v. Trull, 23 Wend. 334; Bridges v. Barry, 3 Tau. 130; Lawrence v. McCalmot, 2 How. 426; Phœnix Mut. Life Ins. Co. v. Allen, 11 Mich. 501; Russel v. Heaton, 10 Ala. 535; Harris v. Johnson, 3 Cranch. 311; Rives v. McCloskey, 5 S. & P. 330; Trotter v. Crockell, 2 Parton, 401.

THE RIGHTS AND DUTIES OF A BAILEE TOWARD RIVAL CLAIMANTS OF THE GOODS.

It often becomes an exceedingly interesting question to a bailee to determine what course to pursue when goods delivered to him, and still in his possession ready for delivery, are demanded from him by rival claimants.

The rule is, that the bailee is bound to redeliver the goods to the bailor upon demand, and that the bailor may recover the goods of his bailee without proving his right of property therein.[1] But supposing that while the goods are still in the bailee's possession, some person, other than the bailor, demands them, and with a showing of title, what is then the duty of the bailee? The law always aids the true owner in the recovery of his property, and he can not be deprived of it by means of any contract relations between third parties.[2]

If the bailee wrongfully refuse to deliver the goods to the bailor, he is guilty of a conversion of them, and is liable to be mulcted in damages. If, on the other hand, the adverse claimant demands them, the bailee's refusal to deliver the goods to him is also a conversion, in case the adverse claimant should prove to have the better title. Placed thus between two fires, the bailee's situation is alike embarrassing and critical.

It may be taken as a general rule that, under the circumstances of this consideration, the duty of re-delivery to the bailor by the bailee attaches to all forms of bailment, and is not measured by the bailee's duty of safe-keeping. The rules regulating the bailee's liability in case the goods are taken from his possession by fire, or theft, or negligence, have no bearing upon the question, where the goods are still in his possession ready for delivery to the true owner.

It may often happen in these cases that the bailee has the means of knowing definitely who the true owner is; or he may be entirely ignorant of any other title than that of his bailor, or of any means of ascertaining who the true owner is.

Supposing then, first, that the bailee has knowledge to a reasonable degree of certainty as to the true owner, what may he do?

[1] Edwards on Bailments, sec. 54; 2 Pars. Cont. 94.
[2] Edwards on Bailments, sec. 73.

It seems now to be well settled, although there are conflicting decisions, that where goods are demanded of the bailee by the true owner, the bailee may lawfully deliver them to the owner, and that such a delivery will be a good defense to any action by the bailor.

In Western Transportation Co. v. Barber,[3] this question was considered, and the court (per Grover, J.) say: "A bailor can confer upon his bailee no better title than he has himself, except in cases of negotiating bills of lading and like cases. If the owner demands the property of the bailee and he refuses to deliver it to him, he is at once liable to him in an action for its conversion. This is a tort, and it would be somewhat anomalous if the bailee should shield himself from this by delivering the property to the owner, that he could not show such facts as a defense to the groundless claim of the bailor for the property. I think the best considered cases hold that the right of a third person to which the bailee has yielded by delivering the property, may be interposed in all cases as a defence to an action brought by the bailor subsequently for the property. When the owner comes and demands his property, he is entitled to its immediate delivery, and it is the duty of the possessor to make it. The law will not adjudge the performance of this duty tortious as against a bailor having no title.[3] Biddle v. Bond[4] was thoroughly considered, and the above conclusions established upon grounds which I think unanswerable. See, also, White v. Bartlett,[5] Cheesman v. Exall,[6] and Dixon v. Yates.[7]"

In Bliven v. Hudson River R. Co.,[8] the court say that it is well settled that the right of the true owner may be set up by the bailee as a defense against the bailor in all cases where the property has been delivered up to him by the bailee, "whether voluntarily on demand, as in Bates v. Stanton,[9] or taken by process in a suit instituted for that purpose."[10]

In Doty v. Hawkins,[11] it was held that a

[3] 56 N. Y., 552.
[4] 6 Best & Smith, 224.
[5] 9 Bing., 382, and note a.
[6] 6 Ex., 341.
[7] 27 Eng. Com. Law, 92.
[8] 36 N. Y., 406.
[9] 1 Duer, 79.
[10] Van Winkle v. United States Steamship Co., 37 Barb. 122; Barton v. Wilkinson, 18 Vt. 186.
[11] 6 N. H., 247; s. c., 25 Am. Dec. 459.

bailor is liable in trover where he refuses to deliver the property to one whom he knows to be the owner thereof, and from whom the bailor obtained the property wrongfully.

Kent states the rule as follows: "The depositary is bound to restore the deposit upon demand to the bailor from whom he received it, unless another person appears to be the right owner. The bailee has a good defense against the bailor, if the bailor had no valid title and the bailee on demand deliver the goods bailed to the rightful owner." [12]

Judge Cooley says: "It is no conversion by a common carrier or other bailee who has received property from one not rightfully entitled to possession, to deliver it in pursuance of the bailment, if this is done before notice of the rights of the real owner. After such notice, he acts at his peril. A delivery to the party entitled to the possession will be a protection to him, and he may defend in the right of such party before delivery." [13]

But supposing, secondly, that the bailee does not know, and has no means of ascertaining, who the true owner is, when conflicting claimants appear, what is he to do then? He is still under the obligation of the general rule to re-deliver the goods to his bailor, upon demand, but he is also under the obligation of a special rule which takes precedence of all others, requiring him to deliver the property to the true owner. How is the true owner to be ascertained?

Parsons, in his work on Contracts, says that the bailee "should, if possible, compel the rival claimants to interplead, or should obtain security from the party to whom he delivers" the goods.[14] We will consider briefly both of the plans here suggested. And, first, as to the right to have interpleader. Story, in his work on Equity Jurisprudence, holds that in cases like the one under consideration, the bailee can not compel the parties to interplead, and that "the true doctrine, supported by the authorities, would seem to be that in cases of adverse independent titles the party holding the property must defend himself as well as he can at law, and he is not entitled to the assistance of a court of equity." [15] And this is also the rule laid down in his work on Bailments.[16]

This is undoubtedly the doctrine of the English cases cited, but would seem to be contrary to the doctrine and practice in the United States. Chancellor Kent, in speaking of cases of this kind, says: "But a more convenient and extensive remedy is afforded in equity by a bill of interpleader which may be applied to all cases in which conflicting claimants of the same debt or duty have interfered and apprised the depository of their demand upon him for their deposit," and, in the note, referring to the above doctrine laid down by Story: "This, if it be a rule in chancery, is a defect in the equity process and jurisdiction greater than I had apprehended."[17]

Edwards, in his work on Bailment,[18] says: "To avoid the inconvenience of a double litigation where there are rival claimants to the property, and an action is brought against the bailee for its detention, the law in some cases permits the adverse claimant to be brought into the suit by the process of garnishment. But a much more convenient remedy is furnished in courts of equity by a bill of interpleader, which may be filed where the plaintiff stands in the position of an innocent stakeholder, against defendants claiming of him the property, fund or duty by different or separate interests; the object being to protect the complainant against a double litigation, involving also the danger of a double recovery against him. The bill lies only where the complainant is in possession and claims no interest in the property in dispute. Its accepted definition is: 'A bill exhibited when two or more persons claim the same debt or duty from the complainant by different or separate interests; and he, not knowing to which of the defendants he ought of right to pay or render it, fears that he may be damaged by the defendants (as by paying his money to a wrong hand), and therefore exhibits his bill of interpleader against them, praying that the court may judge between them to whom the thing belongs, and that he may be indemnified. It claims no right in op-

[12] Citing King v. Richards, 6 Whart. 418; 2 Kent's Com. 567; see, also, 1 Am. Dec. 589, note.
[13] Cooley on Torts, 456.
[14] 2 Parsons on Contracts, 94.
[15] 2 Story's Eq. Jur., sec. 820.
[16] 2nd ed., sec. 110.
[17] 2 Kent's Com., 568, and note a.
[18] Sec. 55.

position to those claimed by the persons against whom the bill is exhibited, but only prays the decree of the court to decide between the rights of those persons, for the safety of the complainant.'"

The allegations in a bill of interpleader are, 1. That two or more persons have preferred claims against the complainant. 2. That they claim the same thing. 3. That the complainant has no beneficial interest in the thing claimed, and 4. That he can not determine, without hazard to himself, to which of the defendants the thing of right belongs. [19]

In these allegations, it will be observed that no claim is made of that privity between bailee and claimant which Story seems to consider necessary. In Sprague v. Soule,[20] the court hold, on the authority of Adam's Equity,[21] that "a bill of interpleader is a bill filed for the protection of a person from whom several persons claim legally or equitably the same thing, debt or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter; and it will not lie where complainant has incurred an independent liability under an express agreement with some of the defendants."

A bailee incurs an independent liability, growing out of the contract of bailment, to return the goods to the bailor, but there is, at the same time, a greater legal liability which he incurs—to deliver the goods to their true owner. While it is undoubtedly true that interpleader, in most of the cases referred to, was invoked to settle disputed claims between two or more joint bailors, yet it would seem that the breaking down of the old inflexible rule that the bailee could not deny his bailor's title, must upon the way for relief in all of those cases where a bailee, claiming no interest in the property himself, and standing ready to deliver it to the person who is entitled to receive it, is threatened with a multiplicity of suits by rival claimants, upon the merits of whose claims he is unable to decide, and who would make him the unoffending target for blows that should be aimed at each other.

But, second, has the bailee the right to demand indemnity? Parsons says: "In practice, it is usual in such cases to demand and receive an indemnity from the party put in possession of the goods."[22] And again, in speaking of rival claimants from a carrier: "The carrier may have his interpleader in equity to ascertain who has the right; but it is not easy to see what adequate means of self protection he has at common law. And yet he should be permitted in some way, to demand security of the party whose title seems to him the better, and to whom he is therefore willing to give the goods. And whenever security is refused, there should be no recovery against him, unless the better title of the person claiming the goods was obvious and certain, or there were other circumstances indicating that the carrier had not acted with entire good faith or proper discretion. But in the present state of the authorities, it seems that if the carrier be called upon by such antagonistic claimants, he must decide between them at his peril."[23]

As a matter of strict legal right, however, it probably must be conceded that the true owner's right to have the goods is not limited upon his ability or willingness to give indemnity. The result of this examination then, is this: If the bailee receive such proof of the claimant's title that he feels safe in acting upon it, he may deliver the goods to the claimant; and if the claimant prove to be the true owner, and to be entitled to the goods, such delivery will be a good defense to any action by the bailor for the goods.

If the bailee can not satisfy himself in regard to the rights of the parties, and, while claiming no interest in the goods himself, and standing ready to deliver them whenever he may do so safely, is threatened with vexatious suits by rival claimants, it seems that he may have his bill of interpleader to determine who is the party entitled to the goods, and to whom he may safely deliver them.

Of course if the party demanding the goods offer satisfactory indemnity to the bailee, he may then deliver them without further inquiry, and rely upon the indemnity to save himself harmless.

F. R. MECHEM.

[19] Atkinson v. Manks, 1 Cow. 703.
[20] 35 Mich. 35.
[21] P. 202-4.
[22] 2 Parsons on Cont., p. 142.
[23] Id., p. 205.

ADMINISTRATION OF TRUST FUND — COSTS.

TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF FLORIDA v. GREENOUGH.

Supreme Court of the United States, October Term, 1881.

1. Whilst in ordinary cases an appeal does not lie from a decree in equity for costs only, yet it does lie when the costs are directed to be paid, not by a particular party, but out of a fund in the hands, or under the control, of the court.

2. A decree made by a circuit court of the United States, directing the payment of costs and expenses, out of a fund in court, to the complainant, the fund, in the mean time, remaining in the court in course of administration, is *pro tanto* a final decree from which an appeal will lie to this court.

3. It is a general principle that a trust estate must bear the necessary expenses of its administration. &c.

4. One jointly interested with others in a common fund, and who, in good faith, maintains the necessary litigation to save it from waste and destruction and secure its proper application, is entitled in equity to reimbursement of costs as between solicitor and client, either out of the fund itself, or by proportional contribution from those who receive the benefit of the litigation.

5. Where a large number of bonds issued by a corporation are secured by a trust fund which is being wasted and misapplied by the trustees, or which they refuse or neglect to apply to the payment of the bonds, a holder of a portion of such bonds who, in good faith, files a bill to secure the due application of the fund, and succeeds in bringing it under the control of the court for the common benefit of the bondholders, is entitled to have his costs, counsel fees and necessary expenses of the litigation—that is to say, his costs as between solicitor and client—paid out of the fund before its distribution.

6. Such a complainant, however, is not entitled to an allowance for his private expenses, such as traveling fares and hotel bills, nor for his own time or personal services.

7. The practice of allowing large and extravagant counsel fees and commissions to trustees, complainants and receivers and their counsel, to be paid out of trust funds under the control of the court, commented on and disapproved.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

Mr. Justice BRADLEY delivered the opinion of the court:

The question in this case is one of costs, expenses and allowances awarded to the complainant below out of a trust fund under the control of the court. Ordinarily a decree will not be reviewed by this court on a question of costs merely in a suit of equity, although the court has entire control of the matter of costs, as well as the merits, when it has possession of the cause on appeal from the final decree. But it was held by Lord Cottenham, in the case of Angell v. Davis, 4 Myl. & Craig, 360, that when the case is not one of personal costs, in which the court has ordered one party to pay them, but a case in which the court has directed them to be paid out of a particular fund, an appeal lies on the part of those interested in the fund, Lord Cottenham, indeed, suggested other cases in which an appeal might lie from a decree for costs, as where the costs are part of the specific relief prayed; and where the whole of the facts distinctly appear upon the face of the proceedings themselves, so that it is not necessary, in determining the question, to enter into any investigation of the merits. But these suggestions have not met with subsequent approval; and in the case of Taylor v. Dowlan, L. R., 4 Ch. App. 697, the court declared that they were not disposed to extend the case of Angell v. Davis, and dismissed an appeal brought by parties ordered to pay costs, which they claimed should be payable out of a fund.

But these discussions in the English courts arose under a system in which appeals from interlocutory orders are allowed. We can only entertain an appeal from a final decree; and supposing the objection to the appeal on the ground of its being from a decree for costs only is untenable, as we think it is, then arises another question, whether the orders appealed from amount to a final decree.

The principal suit was commenced in 1870 by a bill filed by Francis Vose, a large holder of bonds of the Florida Railroad Company, on behalf of himself and the other bondholders, against Harrison Reed and others, Trustees of the Internal Improvement Fund of Florida, and against the former members of the same board, and against the board itself as a corporation, and sundry other corporations alleged to be in complicity with them. The Internal Improvement Fund consisted of ten or eleven millions of acres of land belonging to the State, including certain proceeds of sales of some of said lands, and was pledged for the payment of the interest accruing on said bonds and instalments of a sinking fund, for meet the principal, which were largely in arrear. The charge of the bill was to the effect that the trustees were wasting and destroying the fund by making sales at nominal prices by the hundred thousand and even millions of acres, and failed and refused to provide for the payment of interest or sinking fund on the bonds; and the bill prayed that the fraudulent conveyances should be set aside, that the trustees might be enjoined from selling more lands, and that a receiver might be appointed to take care of the fund.

The litigation was carried on with great vigor and at much expense, and in fact a large amount of the trust fund was secured and saved; the management of the fund was taken out of the hands of the trustees; agents were appointed by the court to make sales of the lands and made a large number of sales; a considerable amount of money was realized, and dividends have been made amongst the bondholders, most of whom came in and took the benefit of the litigation. Vose, the complainant, bore the whole burden of

this litigation, and advanced most of the expenses which were necessary for the purpose of rendering it effective and successful. In 1875 he filed a petition, setting forth these advances and the efforts made by him, and prayed an allowance out of the fund for his expenses and services. In December, 1876, an order was made by the court referring it to a master to ascertain: 1. What and by whom the necessary expenditures have been incurred in bringing the moneys already received into court. 2. What necessary expenditures have been made, and by whom, in protecting the landed and sinking fund from which this money has been and will be realized. 3. What personal services have been rendered, and by whom, in said work, and the value thereof. 4. What amount of same have been charged to Francis Vose by th reeceiver, initead of being paid out of the common fund in his hands,

Vose presented his account and vouchers before the master, and testimony was taken on the subject. In 1877 the master made a report, in which, amongst other things, he stated as follows: "First. After consideration of the proofs as submitted to me, I find and report that the moneys which have already been received, whether upon account of the Internal Improvement Fund or of the sinking fund, have been brought into court at the instance and the suit and by the sole efforts of Francis Vose, the petitioner, through himself, his solicitors and his agents, and by the instrumentality more directly and especially of his proceeding in equity against the Trustees of the Internal Improvement Fund, *et al.*, as they appear in the records which are made evidence in this case."

The master further reported a statement of expenditures made by Vose in the cause, and declared that they were necessary expenditures, being for fees of solicitors and counsel, costs of court, and sundry small incidental items for copying records and the like, the whole amounting to $34,192.62. He also stated and allowed sundry fees paid in maintaining other suits in New York, and on appeal to this court, attorneys' fees for resisting fraudulent coupons, and expenses paid to attorneys and agents to investigate fraudulent grants of the trust lands, amounting in all to $19,745.68. He also reported in favor of an allowance to Vose for his personal services and expenditures as follows: "I further find and report that peculiar and great personal services have been rendered by the petitioner, Francis Vose, in the work of protecting the internal improvement and the sinking funds; those services extending over a period of more than eleven years. By the instrumentalities of the suits already mentioned as having been instituted by him, by the agencies he employed and sustained, and by his own vigilance and personal efforts he has saved from spoliation and subjected to the decrees of this court a vast domain of over ten millions of acres of land; and has brought into this court large sums of money, which, from time to time, have been distributed by its orders. I considera nd report that the charge embraced in his itemized account, and numbered forty-two (42) for $25,000 principal, and $9,025 interest, is reasonable and just. I also find that the charge in his itemized account, numbered forty-one (41) for personal expenditures of $15,003.35 is reasonable and just. Total, $40,003.25."

The first of these items consisted of an allowance of $2,500 a year for ten years of personal services; the second was for railroad fares and hotel bills paid by the complainant.

The proceedings before the master were opposed; but on a hearing upon the report and the evidence submitted therewith, the court confirmed it to the extent of $27,835.34, allowing generally the fees of the officers of the court, and those of the attorneys and solicitors employed in the cause, including charges as between attorney and client; at the same time disallowing certain fees paid to advisory counsel and other items not directly connected with the suit, and referring the remainder of the report for further evidence and hearing. In December, 1879, after additional evidence had been taken, a final order was made, allowing sundry expenses for looking after and reclaiming the trust lands, and also allowing for the personal expenses and services of Vose embraced in the two items before referred to; the total amount allowed being $60,131.96.

The appeal to this court is taken from those orders of the court below; and it is contended that they were illegal, because Vose was not before the court in the character of a trustee, and therefore not entitled to reimbursement of his expenses beyond taxable costs; and because the allowances were not lawful if he had been such trustee. The objections to the orders are not expressed in this precise form, but this is the substance of them.

The first question, however, is whether these orders do or do not amount to a final decree, upon which an appeal lies to this court. They are certainly a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and receiving a final decision. The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but under all the circumstances we think that the proceeding may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal.

As to the point made by the appellants, that the complainant is only a creditor, seeking satisfaction of his debt, and can not be regarded in the light of a trustee, and therefore is not entitled to an allowance for any expenses or counsel fees beyond taxed costs as between party and party, a great deal may be said. In ordinary cases the position of the appellants may be correct. But, in a

case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund; and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust; and where all this has been done, and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from his proceedings; if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interests. He may be said to have saved the fund for the *cestui que trusts*, and to have secured its proper application to their use. There is no doubt, from the evidence, that, besides the bestowment of his time for years almost exclusively to the pursuit of this object, he has expended a large amount of money for which no allowance has been made, nor can properly be made. It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he can not be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution. And such charge can not be justly complained of by the trustees of the Internal Improvement Fund, because, however fair may have been the conduct of the present trustees, who were elected to their positions since the acts complained of were committed by their predecessors, those acts, as the event of the cause shows, furnishes abundant ground for instituting proceedings.

It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of any parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts. This has long been the rule in relation to proceedings for restoring property to the uses of a charity, which has been unjustly diverted therefrom. Thus, in Attorney-General v. The Brewers' Company, 1 P. Wms. 376, Lord Chancellor Cowper allowed costs to the relators out of the improved rents which they received for the charity, "for that they had been serviceable to the charity, by easing them of the six hundred and twenty pounds debt which was claimed against them." In Attorney-General v. Kerr, 4 Beavan, 297, it is conceded to be the general rule that the relator in a charity information, upon obtaining a decree, is entitled to his costs as between solicitor and client. In that case they were not allowed out of the general charity estate, but were charged upon the particular property recovered. The same rule was followed in Attorney-General v. Old South Society, 13 Allen, 474. Of course, it is well understood that costs as between solicitor and client include all reasonable expenses and counsel fees, and are not like costs as between party and party, confined to the taxed costs allowed by the fee bill. This difference is pointed out in the case *In re* Paschal, 10 Wall. 483, 493.

The same rule is applied to creditor's suits, where a fund has been realized by the diligence of the plaintiff. In England, where specialty creditors have a preference, a simple contract creditor who recovers a fund for the general benefit, is allowed his costs, as between party and party, out of the fund in preference to all other claims; and the balance of his costs, as between solicitor and client, are to be paid either out of the fund, or *pro rata* by all the creditors who partake of the benefit of the suit. This was the judgment in Stanton v. Hatfield, 1 Keen, 358; followed in Thompson v. Cooper, 2 Coll. 87. In the latter case Vice-Chancellor Knight Bruce said: "Having come in and proved, and obtained the benefit of the suit which was instituted in their behalf, as well as that of the plaintiff, it can not be just that in such a suit—a suit instituted for the benefit of all the creditors — one alone should bear the burden, when others have the benefit." To the same purport see Tootal v. Spicer, 4 Simons, 510; Larkin v. Paxton, 2 Myl. & K. 320; Barber v. Wardle, 2 Myl. & C. 818; and Sutton v. Doggett, 3 Beav. 9.

The rule that a party who recovers a fund for the common benefit of creditors, is entitled to have his costs and expenses paid out of the fund, prevails in bankruptcy cases. In Worrall v. Harford, 8 Ves. 4, Lord Eldon said, "The petitioning creditor is answerable till the assignment. Can there be a doubt that the assignees, if there be nothing special in the deed, would have a clear right to pay all the expenses incurred? It would be implied, if not expressed." This rule has been followed by the district courts of the United States. See a forcible opinion of Judge Bryan, in *Re* Williams, 2 Bank. Reg. 28, in the District Court of South Carolina; and the case of O'Hara, 8 Law Reg. (N. S) 113, in the Western District of Pennsylvania. In a case in Massachusetts before Judge Lowell, the same rule was adopted. The petitioning creditors charged as an act of bankruptcy the execution of a mortgage by the debtors, and having succeeded, after much opposition, in substantiating the charge, they asked that counsel fees should be allowed them out of the estate. The remarks of Judge Lowell are so apposite, and seem to us so well considered, that we quote from his opinion. "A petition *in invitum*," says he, "to have a debtor adjudged bankrupt is for the benefit of all his unsecured creditors; and a favorable decree gives them all a proportionate advantage, and the court has no power

to order, as is often done in chancery, that this advantage shall depend upon their contributing to the expenses of the suit; but any creditor may carry on the proceedings if the petitioner should refuse to do so; and after adjudication all may prove their debts. In this case the fund from which the dividend will be paid is due entirely to the exertions of the petitioners in setting aside the mortgage; and, in most cases, though not in this, no single creditor, nor any three or four of them, have a sufficient interest to enable them to undertake the conduct of the proceedings without positive loss of money if they can not tax the expenses on the fund, for those expenses will usually exceed the dividend on their debts. * * * * The strong equities of the petitioner's case are not difficult to discover; and the practice under the act of 1841 was to allow such a charge out of the assets, as I find by examining the records. My doubt was of my power in the premises under the fee bill of the 26th of February, 1853, 10 Stat. 161, which does not appear to sanction it, and does appear to be intended to cover the whole ground of taxation of costs at law and in equity and admiralty; and by the general orders, these petitions follow the rule of cases in equity in all matters of costs. Upon reflection, I have concluded that the fee bill is probably intended to reach only taxable costs commonly so called, and may have its full effect without being construed to take away the power of a court of equity to permit counsel fees to be taxed in those cases where a fund is in court upon or to which different parties have distinct rights or claims. * * * * I have been referred to the record of a case in equity in the circuit court in which Judge Sprague, since the passage of the fee bill, ordered the counsel fees of all parties to be paid out of the fund; and Judge Kane adopted a like rule in *Ex parte* Plitt, 2 Wall. jr., 453. These decisions, and those in bankruptcy already cited, justify me in construing the statute in the way which the equities of the case so clearly demand."

The views here expressed with regard to the application of the fee bill to cases of this sort are undoubtedly correct. The fee bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require. The fee bill itself expressly provides that it shall not be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients (other than the government) such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties. Act of 1853, sec. 1, 10 Stat. 161; Rev. Stats., sec. 823. And the act contains nothing which can be fairly construed to deprive the court of chancery of its long established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund.

This court, in the case of Cowdrey v. Galveston R. Co., 93 U. S. 352, sustained an allowance for $5,000 for counsel fees to be paid to counsel out of the proceeds of a railroad mortgage, foreclosed in the circuit court for the district of Texas,—being the amount agreed by the trustees to be paid for instituting proceedings which were discontinued by the intervention of the civil war. A new bill was afterwards filed by some of the bondholders, and the fund was brought into court, and the fee in question was directed to be paid by the receiver. We regarded the charge as a proper one to be paid out of the fund. Liberal allowances were also made by the circuit court in the same ase for counsel fees and other charges incurred by the complainants in the cause, which were never brought to this court for review.

In the vast amount of litigation which has arisen in this country upon railroad mortgages, where various parties have intervened for the protection of their rights, and the fund has been subjected to the control of the court and placed in the hands of receivers or trustees, it has been the common practice, as well in the courts of the United States as in those of the States, to make fair and just allowances for expenses and counsel fees to the trustees, or other parties, promoting the litigation and securing the due application of the property to the trusts and charges to which it was subject Sometimes, no doubt, these allowances have been excessive, and perhaps illegal; and we would be very far from expressing our approval of such large allowances to trustees, receivers and counsel as have sometimes been made, and which have justly excited severe criticism.

Still, a just respect for eminent judges under whose direction many of these cases have been administered, would lead to the conclusion that allowances of this kind, if made with moderation and a jealous regard to the rights of those who are interested in the fund, are not only admissible, but agreeable to the principles of equity and justice.

The subject of allowances to be made to trustees *eo nomine* is very fully examined in the books. An exhaustive citation of both English and American authorities is to be found in the notes to the case of Robinson v. Pett, 2 White & Tudor's Leading Cases in Equity, 238, American Edition, pp. 512-600; and see Perry on Trusts, secs. 891, 910, 912.

It is unnecessary, however, to pursue the subject further. The conclusion to which we have come is that, under the circumstances of this case, the circuit court had the power, in its discretion, to allow to the complainant, Vose, his reasonable costs, counsel fees, charges and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund and causing it to

be subjected to the purposes of the trust. The allowances made for these purposes we have examined and do not find anything therein seriously objectionable. The court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have. It is not shown in this case by the appellants that any of these allowances are excessive, or that the expenditures allowed were not fairly and honestly made.

But there is one class of allowances made by the court which we consider decidedly objectionable. We refer to those made for the personal services and private expenses of the complainant. In England and some of the States, no such allowance is made even to trustees *eo nomine*. In other States it is. But the complainant was not a trustee. He was a creditor, suing on behalf of himself and other creditors, for his and their own benefit and advantage. The reasons which apply to his expenditures in carrying on the suit, and reclaiming the property subject to the trust, do not apply to his personal services and private expenses. We can find no authority whatever for any such charge by a person in his situation. Where an allowance is made to trustees for their personal services, it is made with a view to secure greater activity and diligence in the performance of the trust, and to induce persons of reliable character and business capacity to accept the office of trustee. These considerations have no application to the case of a creditor seeking his rights in a judicial proceeding. It would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid. Such an allowance has neither reason nor authority for its support.

We are of opinion, therefore, that the allowance for these purposes was illegally made, and that to this extent the orders should be reversed. We refer to the allowance in the last order, of $15,003.35 for private expenses, and of $34,625 for personal services. As to those items the said last order will be reversed, and in all other respects both of the orders appealed from will be affirmed.

Mr. Justice MILLER dissenting.

While I agree to the decree of the court in this case, I do not agree to the opinion, so far as it is an argument in favor of a principle on which is founded the grossest judicial abuse of the present day, namely, the absorption of a property or a fund which comes into the control of the court, by making allowances for attorneys' fees and other expenses, pending the litigation, payable out of the common fund, when it may be finally decided that the party who employed the attorney, or incurred the costs, never had any interest in the property or fund in litigation.

This system of paying out of a man's property some one else engaged in the effort to wrest that property from him, can never receive my approval; and as I have had no opportunity to examine the authorities cited in the opinion, I can do no more than make my protest against the doctrine.

AUTHORITY OF ATTORNEY TO COMPROMISE CASE — SPECIFIC PERFORMANCE OF AGREEMENTS TO ARBITRATE PRICE OR VALUE.

BLACK v. ROGERS.

Supreme Court of Missouri, June 5, 1882.

1. An attorney has no power, by virtue of his employment as such, to compromise his client's case; but where an attorney has apparent authority to make a compromise, and the compromise so made is not so flagrantly unfair as to imply fraud or put the opposite party on inquiry, it will be upheld and enforced, although it may subsequently appear that the attorney exceeded his authority.

2. Contracts of sale at a price to be fixed by arbitrators will not be specifically enforced, where the fixing of the price is the principal thing to be arbitrated; but where the principal and primary object of the agreement is something else, and the fixing of the price or value is subsidiary and incidental, the agreement to fix the price or value by arbitrators forms an exception to the general rule, and may be enforced as a part of the contract.

Samuel Davis and *James Cooney*, for appellant; *Chas. A. Winslow*, for respondent.

This is an action of ejectment, commenced in the Saline circuit court, nominally for the east half of the west half of sec. 31, township 52, range 20, in Saline County, Missouri. The real controversy is over a strip of ground on the west side of the half section, commencing on the north line and extending downward.

The answer sets up, in substance, that defendants are the owners of the west half of the above-described half section, and plaintiff the owner of the east half thereof; that the line between said lands was established and agreed upon by former owners, more than ten years ago; that said former owners, and afterward plaintiff and defendants, occupied up to said agreed line, except that plaintiff set a hedge, on the west side of his land, commencing on his north line and extending downward two-thirds of the length of the line, which was set in thirteen feet on his land; that defendant, by consent of plaintiff, joined the south end of this hedge to their fence, on the line extending south from a point thirteen feet west of said hedge; that plaintiffs had previously sued defendants in ejectment, in the Saline Circuit Court, in which the controversy related to the line between them, which suit was pending and on trial at the October term, 1877; that, during the progress of said trial, plaintiff and defendants

entered into a written agreement compromising the matters in dispute between them, which was duly executed and filed in court and judgment entered thereon; that, by the terms of the compromise, the line of the hedge was to be extended through the half section and become the division line, and defendants were to purchase the land west of the hedge, being a strip thirteen feet wide, and that part of the hedge south of the center point on the line, the value of the land and hedge to be ascertained by three disinterested persons, each party to pay his own costs, and the suit to be dismissed; that defendants had since offered to comply with its terms, have always been, and are now, willing to do so; and that plaintiff had repudiated it and renewed his suit for the land in controversy. The judgment on the compromise is pleaded as an estoppel, and specific performance of the compromise agreement is asked. The reply was a general denial. The trial court found for defendants, and entered a decree specifically enforcing a compromise agreement.

Defendants' evidence tended strongly to prove the facts set up in the answer. The compromise agreement was made by Mr. Shackelford for defendants, and Col. Vest for plaintiff, who were the attorneys for the respective parties in the former suit. The plaintiff's own evidence tended to show that he authorized Col. Vest to agree to the compromise of the case, but gave him no authority to make the compromise agreement, and did not learn the terms of the agreement until the judgment had been entered. The compromise was arranged and signed in the court room, pending the trial and during the noon recess, and was announced, and the judgment entered on the meeting of the court after dinner. All the parties were in the room while the compromise was being arranged, and all about the table, and heard it read over, except the plaintiff, as to whose presence at the table and hearing the reading, the evidence was conflicting; but he was near by, knew what was going on, held one consultation with his attorney on the subject, could easily have known the facts, and by his conduct left the impression on defendants and their attorney that Col. Vest was authorized to execute the compromise agreement.

The following is the compromise agreement:

"This suit is compromised on the following terms: The line between the parties shall be established as follows: Run south from a point thirteen feet west of plaintiff's hedge on north, to the fence of defendants extending from the hedge to township line, thence with said fence to township line. The defendants to pay the value of hedge fence from the half mile point from the north corner to south end of hedge, and to pay plaintiff for the thirteen feet lying west of the hedge, and thirteen east of the fence so as to make line straight. The whole then to be partition division fence between plaintiff and defendants. The value of the land on west of hedge and east of fence, and the hedge south of the half-mile point, to be ascertained by two disinterested persons, one chosen by each, and the two thus chosen to select a third, who shall make a valuation, then each party to pay their own costs, the suit being dismissed. The plaintiff and his tenants to have right of way south or north through any gates used by defendants on their land."

SHERWOOD, C. J., delivered the opinion of the court:

The facts in the case show that the attorney for the plaintiff had either the actual or else the apparent authority to make the compromise. The plaintiff was distant but a few feet, and in plain view, while the compromise was being effected. During the progress of the negotiations, his attorney, not being satisfied with a proposal on a certain point, went back to his client, held a conference with him, and, returning, said that, with a named modification, his client would agree to the compromise. The desired concession was made by the defendants, and thereupon the compromise was drawn up, signed by the respective attorneys, Vest and Shackelford, judgment entered upon the agreement, and the pending cause dismissed, while the defendants, with their attorneys, were in the court room, and while, according to the testimony of Mr. Letcher, the plaintiff was, also, there present. There is no pretense that there was any fraud practiced on plaintiff in making the compromise, or that plaintiff's attorney had no authority to make a compromise; and the law is settled that while a compromise made by an attorney without authority or in violation of his client's commands, will not be enforced to the client's injury, yet, if the authority of the attorney be apparent, then his client will be bound, unless the compromise possessed such elements of intrinsic unfairness as to provoke inquiry or imply fraud. Wharton on Agency, sec. 594 and cases cited; Weeks on Attorneys at Law, sec. 230. And the compromise in this case bears no such indications,; and it is evident the plaintiff either heard the compromise agreement made, or else could have done so with a very little exertion on his part.

The judgment entered upon the compromise agreement, though neither formal nor full, was of like binding force on the parties thereto, when rendered, as any other judgment, and no appeal was taken therefrom, or motion or application of any sort made to set that judgment aside, though court remained in session, and plaintiff came into town next day with a copy of the agreement, which he had taken out home and read for the first time the night before, and complained to one of his attorneys that it did not correspond with what he had authorized. If this was the case, then his neglect was inexcusable in failing to acquaint himself with the terms; and on being informed what the terms of the agreement were, he should have taken the necessary steps promptly, to have prevented the judgment, in consequence of the term going by, from hardening into final and irredeemable conclusiveness. But no such

steps were taken, and in consequence thereof, all the matters then controverted must be regarded as *res judicata*, and, therefore, no longer open to re-agitation.

But the claim is made that that portion of the judgment relating to the appointing of persons by the parties to value the strip of land, thirteen feet in width, is not enforcible. This is the general rule as to the selection of persons to fix the valuation of the subject matter of the contract. In a word, agreements to arbitrate are incapable of specific enforcement. Biddle v. Ramsey, 52 Mo. 153; Hug v. Burkleo, 58 Mo. 202; St. Louis v. Gas Light Co., 70 Mo. 562. But though this is the general rule, it is not the universal rule. The rule has its well ascertained exception. This exception occurs when the essence of the agreement does not consist in fixing of a value by arbitrators, but the fixing of such value is merely subsidiary or ancilliary to the principal agreement,as for example, an estate is sold and the timber on a part to be taken at a valuation. In such a case it is held that though the valuation can not be made *modo et forma*, yet, that the court finds no difficulty, but in relation to such minor matters will substitute itself in the place and stead of the arbitrators, since the case is not one where no contract can be made out except through the intervention of arbitrators, but where a valid contract exists independent of their action.

In this case, the parties to the compromise agreement can never be restored to their *statu qua*. That opportunity is forever gone, for the reason of the judgment rendered. So far as concerns the matter embraced in that judgment, they can not be relitigated. The main object of the contract and judgment of compromise was not the sale of a strip of land thirteen feet wide, but the adjustment of a matter hotly litigated, the settlement of a disputed boundary, and the absolute cessation of all litigious strife in respect thereto. But the disputed boundary has been irrevocably fixed by the judgment rendered upon the compromise agreement. A mere incident of that agreement is the fixing of the valuation of the paltry strip of land. In such circumstances, if we are to be guided by the authorities, and sound reason, we can not well hesitate. This evidently was the view taken of the matter by the circuit court, and we affirm the judgment.

All concur.

NOTE.—The distinction between the principal case and those in which courts of equity refuse to enforce simple contracts of sale, where the price alone is left to be fixed by arbitrators, will be found clearly and distinctly drawn, and the authorities discussed and applied with clearness and ability in St. Louis v. Gas-light Co., 70 Mo. 69. The principal case is, however, one of the first impression in this State illustrating the exception to the general rule, and is, therefore, important to the profession. The point decided is supported by the following authorities: St. Louis v. Gas light Co., 70 Mo. 69; Gourlay v. Somerset, 19 Ves. 1 Am. Ed. 429; Jackson v. Jackson, 1 Smale & G. 184; Paris Chocolate Co. v. Crystal Palace Co., 3 Id. 119; Dinham v. Bradford, 5 Chan. App. Cas. 518; Richardson v. Smith, 5 Chan. App. Cas. 648; Smith v. Peters, L. R., 20 Eq. 511; Fry Spec. Perf., 2 Am. Ed., secs. 217, 219; Waterman Spec. Perf., sec. 47, p. 43, sec. 148, p. 193.

In Pomeroy on Contracts, p. 213, sec. 151, where the result of the cases on this subject, which are mainly English, is crystalized, it is said: "The tendency of the later English decisions is to consider these stipulations for a determination of the price by third persons, rather as matters of form than substance; to construe them in such manner that they become incidental only to the main object of the agreement. The court will always look at the substance of the agreement, and disregard the mere forms which had been provided for effectuating it, and which can not be made operative." See Providence v. St. John's Lodge, 2 R. I. 46; Dike v. Greene, 4 R. I. 285.

DEED—AMBIGUITY—GRANTING CLAUSE—CONSTRUCTION.

GREEN BAY, ETC. CANAL Co. v. HEWITT.

Supreme Court of Wisconsin, May 12, 1882.

Where the granting clause or premises in a deed of land in terms conveys the whole title of the grantor, and a subsequent clause declares that he intends to convey only an undivided half thereof, *held*, that the first or granting clause controls, and the whole title passes by the deed.

Appeal from Circuit Court, Outagamie County

Moses Hooper, *B. J. Stevens* and *E. Mariner*, for respondents; *Finches*, *Lynde & Miller*, for appella

Action of ejectment to recover certain land in Outagamie County, described in the complaint. The complaint is in the usual form. The defendants answered jointly, admitting that the defendants Reuter were in possesion of the land claimed, as tenants of the defendants Hewitt, and denying that the plaintiff owned the land or was entitled to the possession of it, or that the defendants unlawfully withhold the possession thereof from the plaintiff. The action having been tried by the court without a jury, the court found for the plaintiff on the whole issue and judgment was ordered and entered for the plaintiff for the recovery of the land claimed. The defendants appeal from the judgment.

LYON, J., delivered the opinion of the court:

The plaintiff company claims title to the whole of the land in controversy, under a deed from Morgan L. Martin to it, executed in February, and recorded in May, 1873. The defendants Hewitt claim title to an undivided half of the said

land under a deed to them executed by said Martin, and recorded in January, 1880.

For the purposes of the case it will be assumed that Martin was the absolute owner of the land, in fee, when he executed the deed thereof to the plaintiff in 1873, and that he derived title to an undivided one-half thereof by a deed theretofore executed to him by one Lowe, who then owned the same, and to the other undivided half by a deed dated December 23, 1871, executed to him by one Evarts, sheriff of Outagamie County, pursuant to a sale thereof on execution. The deed from Martin to the defendants Hewitt purports to convey the same tract conveyed to him by Lowe. This deed puts the title to the undivided half which Martin derived from Lowe in the defendants Hewitt, unless that interest passed to the plaintiff company by virtue of the deed of 1873.

Whether that interest did so pass to the plaintiff under that deed is the controlling question in the case, and the only one it is necessary to determine.

By the deed of 1873 Martin "released, quitclaimed and conveyed to the plaintiff and its successors and assigns, forever, all of his claim, right, title and interest of every name and nature, legal or equitable, in and to all of the following described property." Then follows a description of the land in controversy. Thereinafter we find this clause: "The interest and title intended to be conveyed by this deed is that, and that only, acquired by said Morgan L. Martin by virtue of a deed executed to him by Almeron B. Evarts, sheriff of said Outagamie County, dated December 23, 1871." These are the only clauses in the deed of 1873 which affect the question under consideration. The solution of this question is not without difficulty, but it is made less difficult by the arguments of the learned counsel on both sides, which display great learning, research and ability.

Counsel for the defendants maintain that the granting clause in the deed of 1873 is ambiguous, and have predicated an argument thereupon, and cited many adjudications to support it, that in such a case, the last clause above quoted must control the construction of the deed. We can not adopt the position of counsel. It seems very clear to our minds that the granting clause is not ambiguous. It conveys to the plaintiff in express terms, all of Martin's claim, right, title and interest of every name and nature, legal or equitable, in and to all of the following described property, being the land in controversy. It is not perceived that Martin could have employed plainer or more certain language to effectuate his purpose and intention to convey all of his interest in all of the land in controversy to the plaintiff. On the assumption that the sheriff's deed conveyed to Martin only an undivided half of the land, the clause last quoted is equally free of ambiguity. It is a plain, unmistakeable expression by Martin of his intention to convey to the plaintiff only an undivided half of the land.

The rule has been invoked that deeds and contracts should be construed in accordance with the intention of the parties to them. But that is subject to this other rule that if the instrument is free of ambiguity, such intention must be ascertained from the language of the instrument itself. In such cases, as was tersely said by Lord Denman in Rickman v. Carstairs 5 B. & Ad. 651 (663), "The question is not what was the intention of the parties, but what is the meaning of the words they have used." Or, as was said with equal terseness, by the late Justice Paine, in Farmers' Loan & Trust Co. v. Commercial Bank, 15 Wis. 463 (480), "The sole duty of construction is to find out what was meant by the language of the instrument." See, also, Hubbard v. Marshall, 50 Wis. 322, and cases cited.

Looking to the language employed in the deed of 1873, we find two conflicting intentions clearly expressed—one just as clearly and emphatically as the other. In the granting clause the grantor expresses an intention to convey his whole interest in the land, while in the other clause he expresses an intention to convey only an undivided half of his interest therein. It may be here observed that the last clause is neither an exception or reservation, as those terms are defined in the the law of conveyances. The most that can be claimed for it is, that it performs the office of an *habendum*. Yet it scarcely performs that office. It seems to be nothing more than a mere declaration of intention by the grantor in conflict with that already expressed by him in the premises or granting clause of his deed.

Which of these two conflicting clauses in the deed of 1873 should prevail? This question must be determined by rules of law other than those already mentioned, governing the construction of deeds. One of these rules is that a deed is always construed most strongly against the grantor. 4 Greenleaf's Cruise on Real Property, 302 (Title XXXII, ch. 20, sec. 13.) Another is that where there are two clauses in a deed, and the latter is contradictory to the former, the former shall stand. This is an application of the ancient rule or maxim that "the first deed and the last will shall operate." 4 Id. 300 (Title XXII, ch. 20, sec. 9). As where feoffment in fee is made to A during the life of B. The words "during the life of B" will be rejected because they are contrary to the fee. Id. p. 307, sec. 6. If the subsequent clause in the deed of 1873 is regarded as an *habendum*, then we have this rule laid down by Cruise in the title above cited, ch. 21, secs. 75, 76: "Where the *habendum* is repugnant and contrary to the premises, it is void; and the grantee will take the estate given in the premises. This is a consequence of the rule already stated, that deeds shall be construed most strongly against the grantor; therefore he shall not be allowed to contradict or retract, by any subsequent words, the gift or grant made in the premises. Thus, if lands are given in the premises of a deed to A and his heirs, *habendum* to A for life, the *habendum* is

void; because it is utterly repugnant to and irreconcilable with the premises."

Applying either of the above rules to the deed of 1873, it results that the premises or granting clause therein controls the other clause which conflicts with it, and hence, that the deed conveyed to the plaintiff the whole of Martin's interest in the land in controversy.

The foregoing are, doubtless, to some extent, arbitrary rules of construction, and because they are so, should not be resorted to, except in cases of absolute necessity. If, from the whole instrument, the true intention of the parties can be gathered, that intention should prevail. But where, as in this case, two conflicting intentions are plainly and unequivocally expressed, there is no alternative but to construe it by these rules, even though they may be arbitrary rules. We have not found it necessary to refer to the numerous cases cited by the respective counsel. In many of those cases cited by counsel for the defendant the courts found that there was ambiguity in the granting clauses, which left the courts free to effectuate the intentions expressed in the subsequent clauses; or, the granting clauses contained some reference to such subsequent clauses, showing an intention that the latter should control. It is believed that our views of the case are sustained by the great weight of authority. Certainly they are sustained by many of the cases cited by counsel for the plaintiff, among which is Pynchon v. Stearns, 11 Met. 316, which is a very instructive case on the question now under consideration. See, also, the cases there cited.

We conclude the circuit court correctly found the issues for the plaintiff.

The judgment must be affirmed.

WEEKLY DIGEST OF RECENT CASES.

AGENCY—FACTORS AND BROKERS—FACTOR'S LIEN.

A sold iron to B through C, who negotiated the sale on commission and collected the proceeds. By agreement between A and C, the latter's commissions were earned when the sale was made. He, however, deducted his commissions on each shipment as the proceeds thereof were received, before paying said proceeds to A. A assigned to D a bill for a particular shipment, of which assignment C was notified. Afterwards the proceeds of this shipment came into C's hands, from which he claimed a right to deduct unpaid commissions on the entire sale, and paid to D the proceeds, less the amount of these commissions. In a suit by D against C to recover the balance: *Held*, that as C never had possession, or the right of possession, of the iron, he was to be deemed a broker and not a factor, and that consequently he had no lien on the proceeds of the assigned shipment for unpaid commissions; and further, that having been notified of said assignment prior to the receipt of the proceeds of said shipment, he was precluded from setting off against D the amount of said unpaid commissions, and that hence D was entitled to judgment. *Cabeen v. Schoener*, S. C. Pa., April 10, 1882.

APPEAL—ALLOWANCE—FORMALITY NECESSARY.

The acceptance of security and signing of a citation by the circuit judge is in legal effect the allowance of an appeal, and no formal order of allowance is necessary. *Brandies v. Cochrane*, U. S. S. C., March 13, 1882.

APPEAL—PECUNIARY LIMIT—AGGREGATED VALUES.

In a case where various land owners are assessed by court commissioners, each for small sums, on their lands, although the aggregate of such assessments may exceed $5,000, yet, inasmuch as they are liable each only for his own assessment, the matter in dispute, as regards their right to appeal, is the separate amount assessed against each, and not the aggregate of such amounts. *Russel v. Stansel*, U. S. S. C., March 13, 1882.

ARMY AND NAVY — ALLOWANCE TO OFFICER — TRAVELING EXPENSES.

Officers of the navy, while traveling under orders, engaged in public business, are, under the act of June 30, 1876, entitled to mileage for the distance traveled both by land and sea, and the alleged practice of the accounting officer of the treasury to allow only actual expenses for travel by sea and mileage only for travel by land, is wholly without warrant. *United States v. Temple*, U. S. S. C., March 13, 1882.

CONTRACT—RESCISSION.

A rescission of a contract on account of fraud must be *in toto*, and the party defrauded must promptly rescind or offer to rescind, and return or offer to return the property he acquired by reason of the fraud. *Estes v. Reynolds*, S. C. Mo., May, 1882.

CONTRACT—VOID, AS AGAINST PUBLIC POLICY.

A part of the consideration for a promissory note, and an inducement to give the note, was an agreement on the part of the payee that he would not oppose the maker's application for a discharge in bankruptcy then pending. *Held*, 1. That a contract thus procured is void at common law as against sound public policy. 2. That it was in violation of the terms as well as the policy of the bankrupt act. U. S. Rev. Stat., sec. 5131. 3. That it was not necessary for the maker to prove, in an action against him upon such note, that before the note was thus procured the payee had proved his claim in bankruptcy. *Marble v. Grant*, S. C. Me., May 25, 1882.

DAMAGES—KEEPING FIERCE DOG—EVIDENCE.

In order to render the owner liable in damages to any one bitten by his dog, it must be proved not only that the dog was fierce, but that his owner had knowledge that he was fierce. From the fact that the owner kept his dogs tied, and did not permit them to run at large, it must be presumed that he had knowledge that the dogs were vicious, unruly, and not safe to be permitted to go abroad. *Goode v. Martin*, Md. Ct. App.

EQUITY—CONTRACT—SPECIFIC PERFORMANCE BY ASSIGNEE.

A gave T a deed of certain real estate upon T's agreement to pay certain debts and give A a life lease of the same premises, with the privilege to A to redeem the property conveyed. T paid the debts according to agreement, but before executing the life lease he died. H purchased T's title to the property from his heirs with a full knowledge of the equitable rights of A. *Held*, that,

in a suit in equity by A against H to enforce the agreement made by T, that H was bound by the equities between A and T; and he was decreed to execute a life lease of the premises to A. *Ash v. Hare*, S. C. Me., May 9, 1882.

EQUITY—PERFECTING DEED.

When the grantor by inadvertence or mistake fails to place a seal upon his deed, equity will require him to perfect it so that it will comply with his intention at the time of giving it. *Harding v. Jewell*, S. C. Me., May 26, 1882.

EQUITY—RECORD PRIORITY—PROOF OF NOTICE OF UNRECORDED MORTGAGE.

To justify a court of equity in depriving a party of his legal priority of record of a mortgage, would require satisfactory and conclusive proof of notice at the time he accepted his mortgage of a pre-existing, unrecorded mortgage. *Swartz v. Chickering*, Md. Ct. App.

EVIDENCE—COMPETENCY OF EXECUTOR AS TO HIS OWN CLAIM.

An executor or administrator can not testify in his own behalf in support of his private claim against the estate, which he nominally represents, but which in that instance is the real defendant against which he is proceeding as plaintiff. *Preble v. Preble*, S. C. Me., May 1, 1882.

EVIDENCE—DOCUMENTS EXECUTED IN DUPLICATE AND TRIPLICATE.

Where a contract is executed by the parties thereto in duplicate and triplicate form, they are all originals and primary evidence; and it does not require, in order to introduce one of the duplicates as evidence, that notice should be given to produce the other. *Totten v. Bucy*, Md. Ct. App.

EVIDENCE — NEGOTIABLE PAPER — BURDEN OF PROOF ON HOLDER TO SHOW BONA FIDES.

In an action by the holder (who claimed to have purchased before maturity) of a promissory note payable to W or bearer, against the maker, the proof of fraud or deception in W in obtaining the note (the consideration being shown by the defendant to be worthless), cast upon the holder the burden of proof, that he was a *bona fide* holder for value without notice, or of showing under what circumstances or for what value he became the holder of the note. *Totten v. Bucy*, Md. Ct. App.

EVIDENCE—NOTICE TO PRODUCE WRITING—PAROL TESTIMONY.

Where from the nature of the action defendant has notice that the plaintiff intends to charge him with the possession of a written instrument, formal notice to produce the same at the trial is not essential as a foundation for the introduction of parol testimony touching its contents. *Sciotto Valley R. Co. v. Cronin*, S. C. Ohio, May 9, 1882.

FRAUDULENT CONVEYANCE— PERSONAL LIABILITY OF GRANTEE TO CREDITORS.

The fraudulent grantee of the property of the debtor, conveyed to him for the purpose of hindering delaying and defrauding the creditors of such debtor, who has converted such property so conveyed to him into money, is liable to the creditors for the moneys so received by him, and it is not error to render personal judgment against such grantee for the amount of the money so received by him, in a creditor's action brought against such grantee and the judgment debtor. *Ferguson v. Hillman*, S. C. Wis., May 10, 1882.

INSURANCE, LIFE—PAYMENT OF PREMIUM—PROFITS EARNED BY A MUTUAL COMPANY.

The profits earned by a life insurance company but not declared, as dividends or otherwise, can not be treated as funds in the hands of the company applicable to the payment of a premium; *non constat* that such division ever will be made; that it was subsequently done in this case is not to the point. *Mutual Life Ins. Co. v. Girard Life Ins. Co.*, S. C. Pa., April 24, 1882.

MUNICIPAL BONDS—KANSAS REGISTRATION ACT—CONSTRUCTION.

The act of Kansas of March 2, 1872, requires that bonds issued by counties to aid various public improvements, if subscribed conditionally, shall be deposited with the State treasurer in escrow till the performance of the condition. It also provides that the holder of such bonds shall present them to the State auditor for registration, who, on being satisfied that such bonds have been issued according to the provisions of the act, and that they are genuine, shall register them, and certify on them that they have been regularly issued and are genuine. Certain bonds, unconditional on their face, issued by a county in Kansas, were fraudulently put into circulation without passing through the hands of the treasurer, and the certificate of the auditor fraudulently obtained: *Held*, 1, That the act did not require as a necessary prerequisite to their negotiability that they should in all cases pass through the hands of the treasurer before reaching the auditor. 2. That the action and certificate of the auditor is conclusive evidence, as between the county and a *bona fide* holder, that the bonds, unconditional on their face, were regularly and legally issued, and therefore negotiable. *Lewis v. Barbour County*, U. S. S. C., March 13, 1882.

NEGLIGENCE — BURDEN OF PROOF — CARRIER OF PASSENGERS.

In a suit by a passenger against a railroad company to recover damages for an injury occasioned by a misplaced switch, proof of the fact of the accident constitutes a *prima facie* case for the plaintiff, and throws the burden of proof on the company to show that by no human skill or forethought could the accident have been prevented. *New York, etc. R. Co. v. Daugherty*, S. C. Pa., April 10, 1882.

NEGLIGENCE—PRESUMPTION OF NEGLIGENCE—REBUTTAL.

If a presumption of negligence on the part of the railway company, its employes, servants or agents, as between the company and one of its servants, arises from the mere fact that the forward truck of one of its cars leaves the track, such presumption is merely *prima facie* evidence of negligence, which is fully rebutted by showing that the track was in good repair, the train was properly manned at the time, the cars, engine and their appliances were in good condition and the train was not run at a dangerous rate of speed. Such evidence being before the court, and there being no evidence which tends to show why the trucks left the track, it fails to make out a case of negligence against the company. *Lockwood v. Chicago, etc. R. Co.*, S. C. Wis., May 10, 1882.

NEW TRIAL—MISCONDUCT OF JURORS.

A motion for a new trial can not be sustained by evidence of what is said by jurors while deliberating upon a case. Such evidence is illegal and will not be considered by the court. And when by consent of parties jurors have been allowed to view animals claimed to be those in litigation, it is

not such misconduct as will support a motion for a new trial, if the jurors look at them a second time when neither the parties nor their counsel are present, and no consent of the parties is given for them to do so. *Trafton v. Pitts*, S. C. Me., May 16, 1882.

NUISANCE—VARIANCE.

If one purchase land from another, on which the vendor has erected or maintained a nuisance, while not liable for the erection of the nuisance, he is liable, after knowledge thereof, for all damages sustained by another. But if a former owner has erected a nuisance on land not his own, one purchasing from him is not liable either for the erection or maintenance of such nuisance. Plaintiff can not allege as a ground of recovery, only that his land was overflowed and damaged by water by reason of the erection of two ditches dug by defendant in its right of way, and recover on the ground that defendant cut down the bank of a creek near said ditches, and in consequence of which the volume of water which ran over plaintiff's land from an overflow in the creek was increased. *Wayland v. Kansas City, etc. R. Co.*, S. C. Mo., May, 1882.

PATENT—MEASURE OF DAMAGES FOR INFRINGEMENT.

In a patent case where an infringement was proved, it appearing that there was only a limited market for the invention infringed (which was a pump for drawing gas from oil wells and conducting it to the furnace of the engine), and that every article sold by the parties infringing drove out and took the place of one which otherwise would have been sold by the patentees, the true rule of damages is the difference between the price at which the article infringing the patent was sold and the actual cost of making it, multiplied by the number sold. *Gould's Mf'g Co. v. Cowing*, U. S. S. C., March 13, 1882.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT.

Action against defendant for boarding and nursing one F, a brakeman in defendant's employ, who was injured by one of its trains, and died. The plaintiff at the time kept a boarding-house, and the evidence tended to show that W, who was in defendant's employ as a physician and surgeon, applied to plaintiff to receive F into his house, and promised that defendant would pay for his board and care as well as for the board of nurses and other necessary expenses and damages; that W was authorized by his employment to contract for medicines, bandages and necessary surgical appliances; that W had no direct authority from defendant to contract for either board or medicine for F, but had frequently contracted for medicines for others, and defendant had always paid the bill; that he had never before contracted board bills. *Held*, that the evidence had no tendency to show authority on the part of W to bind defendant for the boarding and nursing of F or any other of the items in plaintiff's account. *Mayberry v. Chicago, etc. R. Co.*, S. C. Mo., May, 1882.

STATUTE OF LIMITATIONS — CONCEALMENT OF CAUSE OF ACTION—FRAUD.

To sustain an averment in a writ, commenced against an administrator more than two years after notice of his appointment, that the cause of action had been fraudulently concealed from the plaintiff by the defendant, the plaintiff testified that the defendant promised before he was appointed administrator that he would see to the plaintiff's account against the estate, and this the defendant had neglected to do. *Held*, that here was not evidence from which a jury could find a fraudulent concealment of the cause of action. The plaintiff's cause of action, if he had one, could not be thereby concealed. *Given v. Whitmore*, S. C. Me., May 4, 1882.

TRUST—IDENTITY OF TRUST FUND.

A bill in equity against an administrator stated in substance that the deceased, at the time of his death, had on deposit in a bank in his own name and "upon his individual account" $898.08, and that "said deposit" included and covered" a balance of $559.35 held by the deceased in trust for the plaintiff, and the prayer was that the administrator be required to pay over for the benefit of the plaintiff such balance. *Held*, that the identity of the trust fund was lost, and the *cestui que trust* stood no better than other creditors of the estate. *Locke v. Sawyer*, S. C. Me., May 3, 1882.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

59. Is an executor empowered to sell real estate under a provision in a will directing the real estate to be sold, not specifying by whom such sale is to be made, for the purpose of paying legacies, erection of tomb stone, and of fencing graveyard? C. R. N.
Washington, D. C.

60. A bill is now pending in the United States Senate, which has passed the House of Representatives, and which provides that the holder, or owner, of a patent (whether he be the patentee or his assignee) shall have no remedy against one who has infringed upon the patent by using the article covered by the patent, if he (the user) bought the patented article in open market for a valuable consideration. Of course, it is apparent that if such a bill should become a law it would render insensible and nugatory that part of a patent which grants to the patentee the exclusive right to use, as well as make and sell, the thing patented to him. But the question which I desire answered is this. Has any United States court, either supreme, circuit or district, ever passed upon the proposition embodied in the proposed law, and, if so, in what case and in what court? F.
Columbus, O.

61. A Kansas banking corporation is indebted to two depositors. A sues and obtains judgment. Bank suspends and becomes insolvent. The president and cashier execute a bill of sale and attach thereto the corporate seal, and sell depositor B the burglar-proof safe belonging to bank, which was used for keeping funds and valuables in. Bill of sale is recorded, but safe is not removed and remains in the vault for more than a year, when A levies on and sells it. B sues A

for conversion. It appears from the testimony, uncontradicted of the president, that neither he nor the cashier had been directed or authorized by the board of directors to sell the property, make bill of sale or attach corporate seal. Can the president and cashier sell such property without special authority from the board of directors, and convey a good title as against judgment creditors without express authority? Give authorities. W. A. H. H.

Lawrence, Kan.

RECENT LEGAL LITERATURE.

THE REPORTERS. The Reporters Arranged and Characterized, with Incidental Remarks. By John William Wallace. Fourth edition, revised and enlarged. Published under the Superintendence of Franklin Fiske Heard. Boston, 1882: Soule & Bugbee.

When it is considered what a position in our system of jurisprudence is occupied by the principle of *stare decisis*, and, when a doctrine is once laid down by a respectable authority, with what blind obedience we accord it full force and effect, it will be readily seen how important and valuable is any book which sheds light upon the sources from which so much of our law is derived. When it is further considered that the reports which, it has been aptly said, are the first endeavor of traditional law to become written, were undertaken originally merely as individual enterprise, frequently without the sanction of judicial authority and, in the majority of instances, by persons self-appointed to the task without having been subjected to any antecedent test of integrity, education or capacity, the practical as well as bibliographic value of Mr. Wallace's work is apparent. He goes over the whole ground, beginning with the Placita Anglo Nomanica (1066-1203) down to Cox's Chancery Cases (1780-1796), and carefully notes the general character and value of the collection, and the degree of credit and authority which has been accorded to it by the profession. But this is by no means the sum of his efforts; if this were all, although the book might still be as useful as at present to the professional reader, it would be infinitely less entertaining and less useful too, to the student of history; for by pleasant and easy digressions the author recounts much in the way of anecdotes of judges, reporters and lawyers; statements of facts in queer cases, etc., that gives new and a most distinct and life like glimpse in the actual life of the period. We venture to say that any lawyer who still continues to read some history, and has not yet permitted himself to lapse into the state of the mere professional drudge, will find here much that will interest and amuse, while those thorough and earnest souls, who like to go to the root of a matter and know not only that there is authority, but how that authority has been rated and respected by the profession in the past, will find here many suggestive hints to aid his researches. The volume is handsomely printed and beautifully bound in half-calf and cloth.

NOTES.

——A good story is told of the venerable Henry W. Paine, of Boston, an eminent member of the bar of that city, who is as remarkable for the kindness of his spirit and for his courteous manner as for his vigor, ability and legal attainments. Some years ago he tried a case for a lady client, but did not receive a decision in his favor, although justice and equity would have warranted it. As he and his client were leaving the court-room, the lady, who is well known as an exponent of woman's rights, said to him: "That was rank injustice." "Certainly, madam," Mr. Paine replied. "Mr. Paine," the lady continued, "when we women get a chance to sit on that bench, such injustice will not be possible." With one of his rich, rare smiles the great lawyer said: "Madam, never expect to see a greater set of old women than are at present on the Massachusetts Supreme Court bench."—*Exchange.*

——It is by no means an uncommon occurrence nowadays for parties to an action to conduct their cases in person, and the practice is by no means confined to male litigants. In a recent instance, where an action was brought by a lady against the Right Hon. W. H. Smith, the First Lord in the Admiralty in the last Conservative Administration, for alleged improper detention of certain securities and documents referring to her income and sanity, for not handing them back to her on his going out of office, and for libel, the plaintiff had apparently prepared the pleadings herself in addition to coming into court to support them in person. Her claim was certainly unique. It ran as follows; "The plaintiff claims £40,000 and all legal expenses and outstanding debts paid and pawn tickets redeemed, a public apology, and all libels contradicted in all the public newspapers, foreign, domestic and English, and the committal of those who slandered and libelled her, and forged and lithographed her name, to Newgate for life, with twenty strokes from the cat-'o-nine tails on the back of each person." Does not the fact that it is possible for a litigant to pursue a claim such as this to the Court of Appeals suggest that there is no sufficient check upon the early stages of frivolous actions?—*Law Times.*

——The Master of the Rolls mentioned last Friday that in 1783 there were only 300 members of the bar altogether, and very few practising in chancery. What a revolution in a single century! —*Law Times.*